No. 16191

United States Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH EDWARD HOPPER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
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Western District of Washington

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

Appellee adopts appellant's statement of jurisdiction.

COUNTERSTATEMENT OF THE CASE[1]

Kenneth Edward Hopper appealed from a verdict of guilty which was returned on July 17, 1958 on Counts I through IV, of an indictment charging violations of the narcotic laws. A verdict of not guilty on Count V of the indictment was returned (Tr. 19). Prior to trial, Hopper moved to suppress a quantity of narcotics sold by him to Younger, an informer, and delivered by Younger to Federal Narcotic Agent Gooder and a quantity of narcotics seized in his hotel room after his arrest. He also moved for the return of the money used by Younger to purchase the drugs from him (Tr. 2). This motion was denied (Tr. 6). Appellant contends that the District Court erred in its ruling and in subsequently admitting these items into evidence.

On March 25, 1958, the appellant was in the company of Younger, an informer, at various times (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner, Henaby and Younger; S.F. 59-61). The appellant was known through informants to Seattle Police Detectives Kirschner and Henaby and to Federal Narcotics Agents Dupuis, Gooder and Hope to have sold narcotics during

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[1] Appellee will adopt appellant's abbreviations, i.e., (Tr.) for all portions of the record except the court reporter's transcript of the trial proceedings which will be referred to by the abbreviation (S.F.)

November 1957 (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner, Henaby and Younger). These informants had been requested by Detective Kirschner to let him know when the appellant returned to the Seattle area (Tr. 6, Affidavit of Kirschner). Lawrence L. Younger was well known to these officers as a narcotic user; to have assisted in many narcotic cases investigated by the Seattle Police Department and to have assisted in a number of cases as a special employee of the Federal Narcotic Bureau in Seattle (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner and Henaby). He had proven to be reliable in tips and information he had given to these officers in the past (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner and Henaby).

Shortly after noon on March 25, 1958, appellant met Younger at the corner of Maynard and Jackson Streets in Seattle (Tr. 6, Affidavit of Younger; S.F. 59). They went to a room in the nearby Atlas Hotel (Tr. 6, Affidavit of Younger; S.F. 60). Hopper told Younger that he had five ounces of narcotics for sale at $300.00 per ounce and Younger told Hopper that if it was any good he would buy an ounce (Tr. 6, Affidavit of Younger; S.F. 61). Younger was given two capsules of narcotics as samples (S.F. 101). After Younger had used the samples, he advised Hopper that it would take a few hours to raise the money to buy an

ounce (Tr. 6, Affidavit of Younger; S.F. 61). Hopper then asked Younger to help him sell the other four ounces of narcotics (Tr. 6, Affidavit of Younger; S.F. 61). Younger told Hopper to wait at Hopper's hotel until Younger called him later on that day (Tr. 6, Affidavit of Younger). At approximately 5:00 P.M. that afternoon, Younger called Hopper by telephone at Hopper's hotel and advised Hopper that he had located someone who wanted to make a big purchase if the "stuff" was any good (Tr. 6, Affidavit of Younger; S.F. 62). Hopper advised Younger to come to the Frye Hotel where he was staying and get some samples. Shortly thereafter, Younger went to Hopper's hotel room and got four capsules (Tr. 6, Affidavit of Younger; S.F. 62-63).

After Younger entered Hopper's room at the Frye Hotel, Hopper left the hotel room for two or three minutes, possibly longer and returned to the room with narcotics from which he made up four capsules (Tr. 6, Affidavit of Younger; S.F. 63). Younger did not know where Hopper kept his narcotics, nor did Hopper tell Younger where he kept the narcotics (Tr. 6, Affidavit of Younger).

After Younger left Hopper's hotel room he made a telephone call to Detective Kirschner at Detective Kirschner's home (Tr. 6, Affidavits of Younger and

Kirschner; S.F. 63). Younger told Kirschner that Hopper was back in town and had a lot of narcotics (Tr. 6, Affidavits of Younger, Kirschner). In response to questions from Detective Kirschner, Younger advised that Hopper was staying at the Frye Hotel, but that he, Younger, did not know or could not remember Hopper's hotel room (Tr. 6, Affidavits of Younger and Kirschner). Detective Kirschner told Younger to find out what room Hopper was staying in at the Frye Hotel and to meet him at his office in the Public Safety Building at 8:00 o'clock that evening (Tr. 6, Affidavits of Younger and Kirschner).

Detective Kirschner then made arrangements to meet Detective Henaby and Federal Narcotic Agents Dupuis, Gooder and Hope (Tr. 6, Affidavit of Kirschner). At 8:00 o'clock or shortly thereafter, the above-mentioned officers and Younger met at the Narcotics Office, Seattle Police Department in the Public Safety Building, Seattle, Washington (Tr. 6, Affidavits of Dupuis, Hope, Gooder, Kirschner, Henaby and Younger; S.F. 35, 47, 56, 64, 218, 251). In response to questions, Younger told the officers that Hopper was staying in room 304, Frye Hotel; that any deal with Hopper had to be made as soon as possible as Hopper was trying to dispose of his narcotics to LeRoy Lemons and/or some other persons at $300.00 an ounce or $1500.00; that he did not know where Hopper

had his narcotics "planted"; that Hopper did not have the narcotics in his hotel room, but had left the hotel room for two or three minutes and possibly longer, returning with the narcotics from which he made up four capsules which Hopper gave to Younger and that Hopper did not tell Younger where he had the narcotics "planted" (Tr. 6, Affidavits of Younger, Hope, Dupuis, Gooder, Kirschner and Henaby).

At the request of the officers, Younger called Main 2-8303 (Tr. 6, Affidavits of Younger, Hope, Dupuis, Gooder, Kirschner and Henaby; S.F. 65, 38, 218). Detective Kirschner was listening to the conversation, and the person answering the telephone stated it was the Frye Hotel (Tr. 6, Affidavits of Younger and Kirschner; S.F. 38). Younger then asked for room 304 (Tr. 6, Affidavits of Younger and Kirschner; S.F. 65). He was told that Hopper was in the bar and that an attempt would be made to get hold of him (Tr. 6, Affidavits of Younger and Kirschner; S.F. 65). After about five minutes a man answered and said, "Hopper speaking" (Tr. 6, Affidavits of Younger and Kirschner; S.F. 66). Arrangements were then made by Younger to meet Hopper at his room at the Frye Hotel about ten minutes after a fight which was then being broadcast, for the purpose of buying the narcotics which Younger had earlier agreed

to purchase from Hopper (Tr. 6, Affidavits of Younger, Kirschner; S.F. 67).

After the telephone conversation, a plan was formulated by the police detectives and federal narcotic agents whereby Younger, Hope and Henaby would go to the Frye Hotel together, the officers keeping Younger under surveillance until he had entered Hopper's hotel room and two or three minutes later, Dupuis, Gooder and Kirschner would follow (Tr. 6, Affidavits of Kirschner, Henaby, Dupuis, Hope, Gooder and Younger). It was part of the plan that Hope and Henaby would remain in a position where they could see Younger enter Hopper's hotel room, but not be seen if someone stepped out of Hopper's room. It was further planned with Younger that he would immediately find out whether there were any narcotics in Hopper's room and that if there were no narcotics, he was immediately to leave. It was the plan of these officers in such event to return to the Narcotic Office, Seattle Police Department and determine a new course of action. In the event that Younger remained inside Hopper's room for more than five minutes, the officers would know that Hopper had narcotics inside the room and the sale to Younger was taking place there (Tr. 6, Affidavits of Kirschner, Henaby, Hope, Gooder, Dupuis and Younger). To enable Younger to know when five minutes had

elapsed, Detective Kirschner gave Younger his watch (Tr. 6, Affidavits of Kirschner and Younger).

At approximately 9:20 P.M. on that evening, Agents Gooder, Hope and Dupuis searched Younger for narcotics and found none. Thereafter Gooder furnished Younger with $200.00 in identifiable government advance funds (Tr. 6, Affidavits of Younger, Gooder, Hope, Dupuis; S.F. 67, 37, 57, 218, 251-252).

Henaby, Younger and Hope then left for room 304, Frye Hotel. Henaby and Hope observed Younger go to room 304, knock on the door and obtain entrance. These officers positioned themselves so that they could watch room 304, but not be seen by anyone who stepped out of that room (Tr. 6, Affidavits of Younger, Henaby and Hope; S.F. 219, 49-50, 68). At approximately 9:40 P.M., Detective Kirschner and Agents Gooder and Dupuis arrived (Tr. 6, Affidavits of Kirschner, Gooder and Dupuis; S.F. 41, 57, 252). Since the five minute period had by that time elapsed Detectives Henaby and Kirschner immediately took up positions outside room 304, Frye Hotel (Tr. 6, Affidavits of Kirschner and Henaby; S.F. 51, 41). Henaby and Kirschner could hear Younger talking with someone inside the room and, in view of their knowledge of Lawrence Younger, the telephone call and plans they had made and based on their experience

with narcotics, narcotic dealers and narcotic users, they concluded that Younger was purchasing a quantity of narcotic drugs from Hopper (Tr. 6, Affidavits of Henaby and Kirschner).

At approximately 10:00 P.M. that evening, the door to Room 304 opened and Younger came out, holding in his left hand a "bindle" which he gave to Gooder in the hallway immediately outside the door (Tr. 6, Affidavits of Gooder and Younger; S.F. 70-71). Before entering the room through the open door, Detectives Kirschner and Henaby and Agent Hope could see that there was only one other person inside the room (Tr. 6, Affidavits of Kirschner, Henaby and Hope; S.F. 143-144, 149). Henaby and Kirschner entered the room with Hope immediately behind them (Tr. 6, Affidavits of Kirschner, Henaby and Hope; S.F. 149, 221). Kirschner said, "This is the police, Hopper. You are under arrest" (Tr. 6, Affidavits of Kirschner, Henaby and Hope; S.F. 113, 149, 221, 268). Hopper then ran three or four steps and grabbed something from the dresser (Tr. 6, Affidavits of Kirschner, Henaby and Hope; S.F. 113, 149, 221). Henaby and Kirschner held Hopper's hands and attempted to take a rubber tube from his right hand. In the scuffle which ensued, Kirschner ripped the rubber tube and Hopper flung it toward the door (Tr. 6, Affidavits of

Kirschner, Henaby and Hope; S.F. 113, 149, 221). At that time, Dupuis, who was about to enter the room, was hit in the face with the rubber tube (Tr. 6, Affidavit of Dupuis; S.F. 254). The contents of this tube spilled on Dupuis and fell on the threshold to Room 304, spilling partly inside and partly outside the room (Tr. 6, Affidavit of Dupuis; S.F. 254).

After Hopper was subdued and handcuffs were placed upon him, a roll of bills was obtained from his person. These bills corresponded to the $200.00 which had previously been given to Younger by Agent Gooder (Tr. 6, Affidavits of Kirschner, Henaby, Gooder, Hope; S.F. 150, 122-123, 222-223). Hopper was then taken to the Seattle City Jail (Tr. 6, Affidavits of Kirschner and Henaby).

On May 5, 1958, appellant filed a motion for return of property and to suppress evidence (Tr. 2), supported by his own affidavit (Tr. 3). On May 15, 1958, the appellee filed affidavits of Younger, Kirschner, Henaby, Gooder, Hope and Dupuis (Tr. 6). After hearing on May 19, 1958 and after further hearing on July 14, 1958, the appellant's motion was denied (Tr. 6). During the trial, the government introduced into evidence the currency obtained from Hopper as plaintiff's Exhibit 4 (S.F. 298), the quantity of narcotics which Younger gave to Gooder outside Room

304 as plaintiff's Exhibit 1 and the quantity of narcotics which had been contained in the rubber tube thrown by Hopper during the scuffle with the officers as plaintiff's Exhibit 2 (S.F. 298).

QUESTION PRESENTED

Did the District Court err in denying the appellant's motion for return of property and to suppress evidence and further err in permitting the appellee to introduce Exhibits 1, 2 and 4 into evidence during the trial. The answer to this question depends upon the answers to the following issues discussed in this brief:

I Whether the narcotics sold by appellant to Younger and delivered to the officers in the hallway outside appellant's hotel room before any entry or arrest were subject to a motion to suppress by appellant.

II Whether there was probable cause to arrest the appellant without a warrant.

III Whether the entry into defendant's hotel room through an open door renders the arrest and therefore the search illegal.

IV Whether the search was incident to a lawful arrest and otherwise reasonable within the requirements of the Fourth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

1. Appellee contends that with regard to the quantity of narcotics delivered by the special employee,

Younger, to Federal Narcotic Agent Gooder in the hallway outside room 304 of the Frye Hotel at 10:00 P.M., March 25, 1958, the trial court did not err in denying appellant's motion to suppress nor did it err in admitting these narcotics into evidence because the appellant claimed neither the right to possession of the hallway where the drugs were seized nor a possessory interest in the property seized. Further, since there was no entry into appellant's hotel room nor arrest nor search until after Younger delivered the drugs to Gooder, this exhibit was neither subject to a motion to suppress nor inadmissible as evidence.

2. The Seattle Police Detectives who arrested the appellant at 10:00 P.M. on March 25, 1958 had probable cause to believe that the appellant had committed and was then committing a felony. Accordingly, they had the duty under Washington law to arrest appellant.

3. Having the duty to arrest appellant at that time, they had the right to effect a peaceable entry through an open door to accomplish appellant's arrest. Such an entry is permissible under Washington law and does not violate the appellant's rights under the Fourth Amendment to the Constitution of the United States.

4. The search of appellant's person and his hotel room being incident to his lawful arrest was otherwise reasonable within the requirements of the Fourth Amendment.

ARGUMENT

I

THE NARCOTICS SOLD BY THE APPELLANT TO YOUNGER AND GIVEN TO THE OFFICERS IN THE HALLWAY OUTSIDE APPELLANT'S HOTEL ROOM BEFORE ANY ENTRY OR ARREST WERE NOT SUBJECT TO A MOTION TO SUPPRESS BY APPELLANT.

That the owner of contraband property illegally seized, though not entitled to have it returned to him, is entitled on motion to have it suppressed as evidence on his trial is not to be doubted, *Jeffers* v. *United States*, 1951, 342 U.S. 48, 54, 72, S.Ct. 93, 96 L.Ed. 59, but one so moving must assert some interest in the property seized, *Wilson* v. *United States*, 10 Cir., 1955, 218 F. 2d 754, 756, or proprietary interest in the premises searched, *In re Nassetta*, 2 Cir., 1942, 125 F. 2d 924, 925; *United States* v. *Pepe*, 2 Cir., 1957, 247 F. 2d 838, 841. With regard to plaintiff's Exhibit 1, which was handed to Agent Gooder by Younger outside room 304 of the Frye Hotel and which had been sold to Younger by Hopper, the appellant was in no position to suppress the same as evidence since he did not

claim any interest in those narcotics nor in the hallway outside room 304 of the Frye Hotel (Tr. 3; Tr. 6, Affidavit of Gooder). Indeed, no entry, arrest or search was made until after Younger delivered this quantity of narcotics to Gooder.[2] As the court said in *United States* v. *Pepe*, *supra*, at page 841:

> "It is well settled that one who does not show either the right to possession of the premises searched or a possessory interest in the property seized will not be heard to complain that a search and seizure are illegal". See also *Armstrong* v. *United States*, 9 Cir., 1926, 16 F. 2d 62, 65, cert. den. 273 U.S. 766, 47 S.Ct. 571, 71 L.Ed. 881.

II

THERE WAS PROBABLE CAUSE TO ARREST THE APPELLANT WITHOUT A WARRANT.

An officer has the undoubted right to search the person whom he lawfully arrests, *Weeks* v. *United States*, 1914, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652, and contemporaneously with such arrest to search the place in which it is made, *Rabinowitz* v. *United States*, 1950, 339 U.S. 56, 61, 70 S.Ct. 430, 94 L.Ed. 653; *Harris* v. *United States*, 1947, 331 U.S. 145, 151, 67

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2 In connection with the marked government advance funds which the appellant seeks to have returned to him, it would appear anomalous that anyone could engage in a criminal narcotics transaction and have the government by judicial sanction be compelled to deliver to him government money so that he could profit from the transaction, even if entitled to have it suppressed.

S.Ct. 1098, 91 L.Ed. 1399; *Agnello* v. *United States*, 1925, 269 U.S. 20, 30, 46 S.Ct. 4, 70 L.Ed. 145. It is appellee's position that the search of appellant's person and of the hotel room where he was arrested was incident to his valid arrest. The determination of the validity of an arrest is governed by state law in the absence of an applicable federal statute. *Miller* v. *United States*, 1958, 357 U.S. 301, 305, 78 S.Ct. 1190, 2 L.Ed. 2d 1332; *Johnson* v. *United States*, 1948, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436; *United States* v. *DiRe*, 1948, 332 U.S. 581, 589, 68 S.Ct. 222, 92 L.Ed. 210; *Symons* v. *United States*, 9 Cir., 1949, 178 F. 2d 615, 619. The leading expression by the Supreme Court of Washington on the question of the validity of an arrest without a warrant is contained in *State* v. *Hughlett*, 1923, 124 Wash. 366, 214 Pac. 814. The court there said at page 368 as follows:

> "Circumstances, however, may arise where it is not only within the power of the police officers, but it is their duty to make arrest without any warrant therefor. In misdemeanor cases the officer may not arrest without a warrant therefor, except where the crime is being committed in his presence, or where he had actual knowledge that the person about to be arrested committed the crime. But in cases amounting to a felony, if the officer believe, and have good reason to believe, that a person has committed, or is about to commit, or is in the act of committing the crime, then he may arrest without a warrant. But the arresting officer must not only have a real belief

> of the guilt of the person about to be arrested, but such belief must be based upon reasonable grounds".[3]

The Washington rule is the same as that confirmed in this court's opinion in *Blackford* v. *United States*, 1957, 247 F. 2d 745, 749; it is the common law rule, *State* v. *Symes*, 1899, 20 Wash. 484, 488, 55 Pac. 626, and it is the standard of 26 U.S.C. §7607,[4]; *Draper* v. *United States*, January 26, 1959, ——— U.S. ———, 27 L.W. 4085, 4086, reported below in 248 F. 2d 295, 10 Cir.; *United States* v. *Walker*, 7 Cir., 1957, 246 F. 2d 519, 526.

Probable cause for arrest is defined in *State* v. *Hughlett*, *supra*, [124 Wash. 366] at page 368 as,

> ". . . a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the

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[3] The appellant's unsupported statement at page 13 of his brief that the law requires that ". . . the arresting officers have positive knowledge that a felony has occurred and a reasonable belief that the one to be arrested is the perpetrator of it . . ." to justify an arrest without a warrant is not the law of Washington. See *Johnson* v. *United States*, 1948, 333 U.S. 10, 15, 68 S.Ct. 367, 92 L.Ed. 436. The *Hughlett* case has been cited with approval in many Washington cases discussing probable cause to arrest without a warrant. *State* v. *Thornton*, 1926, 137 Wash. 495, 498, 243 Pac. 12; *State* v. *Knudsen*, 1929, 154 Wash. 87, 91, 280 Pac. 922; *State* v. *Zupan*, 1929, 155 Wash. 80, 85, 283 Pac. 671; *State* v. *Lindsey*, 1937, 192 Wash. 356, 359, 73 P. 2d 738, cert. den. 303 U.S. 654, 58 S.Ct. 761, 82 L.Ed. 1114, reh. den. 303 U.S. 669, 58 S.Ct. 830, 82 L.Ed. 1125; *State* v. *Kranz*, 1945, 24 Wn. (2d) 350, 352, 164 P. 2d 453; *State ex rel Fong* v. *Superior Court*, 1948, 29 Wn. (2d) 601, 608, 188 P. 2d 125; *State* v. *Young*, 1952, 39 Wn.

> accused to be guilty. An officer may not arrest simply because he has some fleeting idea that one may be about to commit a felony, but he must have reasonable ground for his belief."

This definition was followed in *State ex rel Fong* v. *Superior Court*, 1948, 29 Wn. (2d) 601, 608, 188 P. 2d 125, citing 4 *Am. Jur.* 18, 19, Arrest, §§25, 26; 6 C.J.S. 586, 689, Arrest §6. It is substantially the same as that used in *Carroll* v. *United States*, 1925, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543; *Brinegar* v. *United States*, 1949, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879, and *Blackford* v. *United States*, *supra*, [247 F. 2d 745], at page 749. It is substantially the same definition used by the court in *Draper*, *supra*, [27 L.W. 4085], in defining "reasonable grounds" as that term is used in 26 U.S.C. §7607. It is the definition of "probable cause" as that term is used in the Fourth Amendment to the Constitution of the

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(2d) 910, 915, 239 P. 2d 858; *State* v. *Mason*, 1953, 41 Wn. (2d) 746, 750, 252 P. 2d 298; *State* v. *Henker*, 1957, 50 Wn. (2d) 809, 811, 315 P. 2d 645. See also *State* v. *Phillips*, 1931, 163 Wash. 207, 209, 300 Pac. 521 and *State* v. *Robbins*, 1946, 25 Wn. (2d) 110, 113, 169 P. 2d 246.

[4]26 U.S.C. §7607 provides in pertinent part:

> "The Commissioner . . . and agents, of the Bureau of Narcotics . . . may—
>
> * * * * * * *
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

United States,[5] *Draper, supra,* at 27 L.W. 4086. In *Draper, supra,* at 27 L.W. 4087 the court said:

> "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act' *Brinegar* v. *United States, supra,* at page 175. Probable cause exists where 'the facts and circumstances within [the arresting officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162."

In this connection, the Washington Supreme Court in *State* v. *Green,* 1953, 43 Wn. (2d) 102, 260 P. 2d 343, at page 108, quoted with approval the following pertinent language of the trial judge:

> "'In the natural development of any case there is a stage where responsible law enforcement officers must act. They cannot wait in every case until they have in their hands a completely prepared case that proves a man guilty beyond reasonable doubt, before they file a charge or before they arrest. If they were required to do so, our

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[5] The Fourth Amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

whole system of law enforcement would break down.

So here the test is not whether at that moment in the Ambassador Hotel at the time they made the arrest they had enough evidence to make a complete case of proof of guilt. The question is: Did they have enough information to make them honestly believe that there was probable cause and reasonable grounds connecting the defendants with the charge?' "

In *Johnson* v. *United States, supra,* [333 U.S. 10] discussed in Appellant's Brief commencing at page 20, a Seattle narcotic detective received information at about 7:30 P.M. from a confidential informant who was a known narcotic user that unknown persons were smoking opium in the Europe Hotel. The detective communicated this information to federal narcotic agents and between 8:30 and 9:00 P.M., the officers went to the hotel. Upon arrival these experienced officers immediately recognized a strong odor of burning opium which to them was distinctive and unmistakable. This odor led them to a particular room where they knocked, identified themselves as police and after some shuffling noise and slight delay were admitted by the defendant. The officers placed her under arrest; searched the apartment and seized opium and opium smoking apparatus.

The government contended that the search was incident to a valid arrest, but conceded that the arrest-

ing officer did not have probable cause to arrest until he entered the room and found the defendant to be the sole occupant. The court said at page 16:

> "Thus the government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.
>
> Thus the government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest."

The facts here involved are dissimilar. The arrest was based on facts learned prior to the entry into room 304 of the Frye Hotel. The validity of Hopper's arrest does not depend on any search.

In *Agnello* v. *United States, supra,* [269 U.S. 20], Centorino, Pace, Frank and Thomas Agnello left Frank Agnello's home and went to Alba's house. Looking through the windows of Alba's house, narcotic agents saw Frank Agnello produce a number of small packages for delivery to Napolitano, an informer, and saw Napolitano hand over money to Alba. Napolitano had gone there to purchase narcotics. Upon the apparent consummation of the sale, the agents rushed in and arrested all the defendants. There was no analysis of the substance in the packages prior to the

arrests nor was there a search or arrest warrant. The officers found some packages on the table where the transaction took place and found others in the pockets of Frank Agnello. All contained cocaine. On searching Alba, they found the money given him by Napolitano. The Supreme Court said at page 30:

> "The legality of the arrests or of the searches and seizures made at the home of Alba is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests."

In *United States* v. *Garnes*,[6] 2 Cir., 1958, 258 F. 2d 530, 532, reported below in 156 F. Supp. 467, 1957, D.C. S.D. N.Y., the facts were set forth as follows:

> "Shortly after midnight on the night of May 31, 1957, Bureau of Narcotic Agents arrested Norman Becknell in New York City as he was in the

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[6] Although appellant asserts at page 35 of his brief that there was a chemical analysis of the substance obtained from the informer prior to entry into the dwelling in *Mattus* v. *United States*, 9 Cir., 1926, 11 F. 2d 503, discussed infra, and asserts at page 37 of his brief that there was such an analysis made in *Garnes*, the opinions as reported made no mention of an analysis or field test. Thus, it would appear appellant is in error in the following statement at pages 43-44 of his brief:

> "Finally, there is nothing whatsoever in any of these recent decisions to indicate that the Circuit Courts or the United States Supreme Court would justify an arrest as being predicated upon probable cause in the absence of a chemical determination of narcotics concerning the substance that has come from the room in which the arrest is sough to be made. This, if anything, appears to be the essential ingredient in order to predicate a finding of probable cause to permit an 'inside the room' arrest without a warrant of any kind. Absent such an ingredient, and such is most certainly absent in the instant situation, no court has ever held that probable cause existed to make an inside the room arrest."

act of selling three ounces of heroin to Narcotics Agent James Bailey. A few moments later they arrested Frank Gayles, whom Becknell pointed out to them as his source of supply. After questioning Becknell and Gayles, the agents learned that Gayles had obtained the narcotics that day from defendant and her paramour, George Wilson, at their apartment. Gayles further stated that the balance of an ounce of pure heroin from which he and Wilson had 'cut' the three ounces of narcotics delivered to Agent Bailey remained at defendant's apartment and that the agents could probably then find her in the apartment, and Wilson either with her or standing in front of one of two nearby bars. As Gayles had mentioned having previous dealings with Lubert, another Bureau of Narcotics Agent, the arresting agents checked on Gayles' reliability by telephoning that agent. He informed them that any information supplied by Gayles 'would be worth the trouble to find out if it was true or not'. At this point the agents had more than sufficient information to establish probable cause for defendant's arrest at her apartment; and the lateness of the hour, coupled with the danger of removal or destruction of the contraband the agents reasonably believed to be in the apartment, justified them in proceeding without a warrant. See *Johnson* v. *United States*, 333 U.S. 10, 14, 15, 68 S.Ct. 367, 92 L.Ed. 436".

In *Mattus* v. *United States*, 9 Cir., 1926, 11 F. 2d 503, the facts upon which a finding of probable cause to arrest without a warrant was based were set forth at page 504 as follows:

"It was shown that officers had instructed an informer, whom they first thoroughly searched to

> ascertain whether he had narcotics on his person, to enter the defendant's house and with certain marked currency which was given him to purchase morphine; that they saw him enter the house and in a few minutes return therefrom and hand to the officers four packages of morphine; that thereupon the officers entered the house and arrested the defendant, and at the same time seized two packages of morphine which the defendant's wife was trying to conceal."

The facts here involved are substantially the same as in *Agnello, supra, Garnes, supra,* and *Mattus, supra.* Certainly, when Younger came out of room 304 of the Frye Hotel at 10 P.M. on March 25, 1958 and handed a "bindle" to agent Gooder, after he was furnished the marked money and went to Hopper's room to purchase narcotics from Hopper and after the conversation heard over the transom, the arresting officers had more than sufficient information to establish probable cause for defendant's arrest. Indeed they had a duty to arrest for a felony under the Washington narcotic laws contained in R.C.W., chapter 69.33. See also *Volkell* v. *United States,* 2 Cir., 1958, 251 F. 2d 333, cert. den. 356 U.S. 962, 78 S.Ct. 1000, 2 L.Ed. 2d 1068.

III

THE ENTRY INTO APPELLANT'S HOTEL ROOM THROUGH AN OPEN DOOR DOES NOT RENDER THE ARREST AND THEREFORE THE SEARCH ILLEGAL.

In his Summary of Argument at page 11 of his brief, appellant contends that the arrest and search of appellant and his premises were unlawful because entry was made into appellant's room without the officers first giving notice of their authority and stating the purpose for which they demanded admission. This argument is based upon *Miller* v. *United States*, *supra*, [357 U.S. 301], which is discussed in Appellant's Brief commencing on page 39. But in Miller the issue was whether the arrest and therefore the search was unlawful under the law of the District of Columbia because the officers broke the door of petitioner's apartment to effect his arrest. *Miller*, *supra*, page 305. The government agreed with Miller that the validity of the breaking and entering to arrest without a warrant under District of Columbia law must be tested by criteria identical with those embodied in 18 U.S.C. §3109[7]. The Supreme Court stated at pages 305-306

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[7] 18 U.S.C. §3109:

"The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

that the validity of such an arrest is to be determined by state law but nevertheless reviewed this case for the reason set out at page 306 as follows:

> "These statutory requirements are substantially identical to those judicially developed by the Court of Appeals for the District of Columbia in *Accarino* v. *United States*, 85 U.S. App. D.C. 394, 403, 179 F. 2d 456, 465. Since the rule of *Accarino* bears such a close relationship to a statute which is not confined in operation to the District of Columbia, we believe that review is warranted here."

We are not here nor was the Supreme Court in *Miller* concerned with the Fourth Amendment to the Constitution, but we are and the Court in *Miller* was concerned with the validity of an arrest under local law, *Miller*, *supra* [357 U.S. 301], at page 305. According to the court at pages 308 and 309, both the federal statute and the rule of *Accarino* v. *United States*, D.C. Cir., 1949, 179 F. 2d 456, were based on *Semayne's Case*, 5 Co. Rep. 91a, 11 E.R.C. 629, 77 Eng. Repr. 194. At page 308 the court quotes the following language from *Semayne's Case* at page 195 of 77 Eng. Repr.:

> "'In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . .*' (Emphasis supplied.)"

The language of *Semayne's Case* not quoted by the Supreme Court in *Miller* is pertinent here:

> "In all cases, when the door is open the sheriff may enter the house and do execution . . ."

and in the instant case the door through which the officers entered was open.

In connection with the historical development of these rules, Professor Wilgus in his article *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 673, 798, (1924)[8] states at page 800:

> "There are two old maxims that seem inconsistent: 'Every man's house is his castle' and 'the king's keys unlock all doors.' These relate to different things; the first applies to civil process and the second to criminal process. An early dictum in the yearbook says: For a felony, or suspicion of felony, one may break into the dwelling house to take the felon, for it is for the common weal and to the interest of the King to take him; but it is otherwise as to debt or trespass; the sheriff or any other may not break into his dwelling to take him, for it is only for the private interest of the party.
>
> "The leading case is *Semayne's Case* . . . The rules stated in this case still obtain. Breaking doors to arrest the owner or seize his property in a civil suit except to recover land is not allowed,

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[8]Cited in *Miller, supra,* (357 U.S. 301) at page 307, footnote 6; and by Judge Prettyman in *Accarino, supra,* (179 F. 2d 456) at 463. This subject is also discussed in an annotation at 5 A.L.R. 263.

> although breaking into the house of another person is permitted, . . . Entry through an open door was allowed in either case."[9]

The common law rule permits a peaceful entry to effect an arrest. Such an entry is permitted in the District of Columbia with whose laws the Supreme Court was concerned in *Miller, Smith* v. *United States,* D.C. Cir., 1958, 254 F. 2d 751, 754, cert. den. 357 U.S. 937, 78 S.Ct. 1388, 2 L.Ed. 2d 1552; *Jennings* v. *United States,* D.C. Cir., 1957, 247 F. 2d 784, 785; and even where a door knob is turned to effect entry, *Ellison* v. *United States,* D.C. Cir., 1953, 206 F. 2d 476. In *Ellison* at page 479, the court said:

> "This brings us to appellant's remaining contention: that the entry into the house was an invasion of his rights. Here, too, we must rule against him. If there was probable cause to make an arrest—as we hold there was—there was justification for at least the peaceable entry which here was made. *Martin* v. *United States,* 4 Cir., 1950, 183 F. 2d 436, certiorari denied 340 U.S. 904, 71 S.Ct. 280, 95 L.Ed. 554; *Morton* v. *United States,* 1945, 79 U.S. App. D.C. 329, 147 F. 2d 28, certiorari denied 324 U.S. 875, 65 S.Ct. 1015, 89 L.Ed. 1428. There is no need to determine whether consent was given: here the entry was proper regardless of consent".

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[9] In *Miller, supra,* (357 U.S. 301), at page 307, the Supreme Court apparently proceeds from the adage that a man's house is his castle though concerned with a criminal arrest.

The common law rule of *Semaynes' Case* is reflected in R.C.W. 10.31.040,[10] *Miller* v. *United States, supra.* [357 U.S.] at page 309, and distinguishes between a breaking and entering and entry through an open door. A peaceful entry to effect an arrest without a search or arrest warrant was upheld in *State* v. *Basil*, 1923, 126 Wash. 155, 217 Pac. 720, where the officers, in order to enter the house, were obliged to open the outer door which, although latched, was not locked. At page 157, the court said:

> "Since the officers entered without invitation, the additional question is, does this fact render their entire acts so far unlawful that the liquors seized cannot be introduced in evidence on the trial of its possessor for unlawful possession. It is our opinion that the evidence was admissible. Conceding that the entry of the officers into the dwelling house was a trespass, it was but that and nothing more. It was not unlawful in the sense that they entered for an unlawful purpose. They had no purpose to search the dwelling for evidences of crime, nor purpose to commit any other wrongful or unlawful act therein. The dwelling was not locked against them, nor were they forbidden by the owner to enter. They therefore, committed no offense against the criminal statutes by entering in the manner they did enter; at most they committed a civil trespass."

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[10] R.C.W. 10.31.040:

"To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance."

Other Washington cases permitting peaceful entry to effect arrest are: *State* v. *Kittle*, 1926, 137 Wash. 173, 175, 214 Pac. 962; *State* v. *Dutcher*, 1927, 141 Wash. 627, 629, 251 Pac. 879; *State* v. *Llewellyn*, 1922, 119 Wash. 306, 309, 205 Pac. 394[11]. In *State* v. *Evans*, 1927, 145 Wash. 4, 13, 258 Pac. 845, and *State* v. *Thomas*, 1935, 183 Wash. 643, 645, 49 P. 2d 28, the court upheld entries into dwellings to search as incident to arrest even in the absence of defendants.

Although the Washington Constitution prohibits searches without "authority of law"[12] and is implemented by a statute[13] it is complied with where a search and seizure are incident to a lawful arrest. *State* v. *Cyr*, 1952, 40 Wn. (2d) 840, 843, 246 P. 2d 480 (opinion by Hamley, J.); *State* v. *McCollum*,

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[11] Federal cases permitting entry of a dwelling to effect an arrest on probable cause are *McBride* v. *United States*, 5 Cir., 1922, 284 Fed. 416, 418, cert. den. 261 U.S. 614, 43 S.Ct. 359, 67 L.Ed. 827; *Cardinal* v. *United States*, 6 Cir., 1935, 79 F. 2d 825, 826; *Rocchia* v. *United States*, 9 Cir., 1935, 78 F. 2d 966, 969; *Mattus* v. *United States, supra,* (11 F. 2d 503), at 504; cf. *Agnello* v. *United States, supra,* (269 U.S. 20) where the court upheld Agnello's arrest on probable cause where there was no search or arrest warrant without discussing the entry into Alba's dwelling to effect the arrest.

[12] Art. 1 §7 Washington Constitution:

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

[13] R.C.W. 10.79.040:

"It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant issued upon a complaint as by law provided."

1943, 17 Wn. (2d) 85, 136 P. 2d 165; *State* v. *Thomas*, *supra*, [183 Wash. 643]; *State* v. *Much*, 1930, 156 Wash. 403, 411, 287 Pac. 57.

The rule in *Miller*, *supra*, [357 U.S. 301] is confined to forcible entry situations. *United States* v. *Garnes*, *supra*, [258 F. 2d 530]. The court in Garnes said at page 533:

> "*Miller* v. *United States*, 78 S.Ct. 1190 and *Accarino* v. *United States*, 85 U.S. App. D.C. 395, 179 F. 2d 456, on which defendant relies, invalidate neither the arrest nor the search and seizure, since the rule of those cases is applicable only where arresting officers forcibly break into and enter a dwelling."[14]

Since under the above reasoning a peaceful entry through an open door is permissible to effect an arrest under Washington law and since *Miller*, *supra*, [357 U.S. 301], does not apply to the instant situation, the entry into appellant's hotel room through an open door does not render the arrest and therefore the search illegal.

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14 The appellant is in error when he states at page 43 of his brief, "Certainly, no case has limited the ruling in the *Miller* case, *supra*, to 'forced entry' situations, and it would seem reasonable to extend the *Miller* case ruling to entry by subterfuge situations." Appellant in his brief has discussed extensively (pgs. 37-38, 42-43) the *Garnes* case quoted above. See also footnote 6.

IV

THE SEARCH OF APPELLANT'S PERSON AND HIS HOTEL ROOM BEING INCIDENT TO HIS LAWFUL ARREST WAS OTHERWISE REASONABLE WITHIN THE REQUIREMENTS OF THE FOURTH AMENDMENT.

Because appellant places such reliance upon *Johnson* v. *United States, supra,* [333 U.S. 10] and *MacDonald* v. *United States,* 1948, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (Appellant's Brief, pages 20-21, 23-30, 35-38, 44, 47), the following brief discussion of searches incidental to arrest under the requirements of the Fourth Amendment is submitted, followed by a discussion of the *Johnson* and *MacDonald* cases and the impact of *Rabinowitz* v. *United States, supra,* [339 U.S. 56] upon them so that *Johnson* and *MacDonald* may be appraised in their proper perspective. In the background of the law of searches incident to arrest the reasonableness of the search with which we are here concerned becomes evident.

The Fourth Amendment to the Constitution was the answer of the Revolutionary statesmen to the evils of unreasonable searches without warrants and searches with warrants unrestricted in scope. *Gouled* v. *United States,* 1921, 255 U.S. 298, 304, 41 S.Ct. 261, 65 L.Ed. 647; *Boyd* v. *United States,* 1886, 116 U.S.

616, 624, 625, 6 S.Ct. 524, 29 L.Ed. 746. An exception to the prohibition of this amendment existed where a search was made as incident to a lawful arrest.[15] *Weeks* v. *United States, supra,* [232 U.S. 383]. The basic roots of this exception are in the necessity of affording protection to the arrester; to deprive the prisoner of the potential means of escape and to avoid the destruction of evidence by the arrested person. *United States* v. *Rabinowitz, supra,* [339 U.S. 56] dissenting opinion of Frankfurter J. at page 72. From this it follows that officers may search and seize not only the things physically on the person arrested, but those within his immediate physical control. *Harris* v. *United States, supra,* [331 U.S. 145]; *Agnello* v. *United States, supra,* [269 U.S. 20]; *United States* v. *Rabinowitz, supra,* [339 U.S. 56]. The right exists to seize visible instruments of crime at the scene of

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15 Another exception likewise rooted in necessity permits the search without warrant of moving vehicles because it is not practical to secure a warrant where a vehicle can be moved out of the jurisdiction. *Carroll* v. *United States,* 1925, 267 U.S. 132, 155, 156, 45 S.Ct. 280, 69 L.Ed. 543; *Brinegar* v. *United States,* 1949, 338 U.S. 160, 170, 69 S.Ct. 1302, 93 L.Ed. 1879.

It appears that appellant confuses probable cause to search moving vehicles and probable cause to arrest in his discussion of vehicle cases at pages 14-15 of his brief. Chief Justice Taft, speaking for the court in *Carroll, supra,* said at page 158:

"The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

arrest because such seizure involves no search; *Marron* v. *United States*, 1927, 275 U.S. 192, 198, 48 S.Ct. 74, 72 L.Ed. 231, and a dwelling may be searched incident to a valid arrest, *Harris* v. *United States*, *supra*, [331 U.S. 145]; *Agnello* v. *United States*, *supra*, [269 U.S. 20]. Each case, however, arising under the Fourth Amendment must be decided upon its own facts and circumstances. *Harris* v. *United States*, *supra*; *Go-Bart Co.* v. *United States*, 1931, 282 U.S. 344, 356, 51 S.Ct. 153, 75 L.Ed. 374.

In this background of search without warrant incident to arrest under the Fourth Amendment the Supreme Court decided *Johnson* v. *United States*, *supra*, [333 U.S. 10] in February 1948. This case is discussed at pages 19-20 of this brief. The court decided that there was no probable cause to arrest and said at pages 14-15 that there were exceptional circumstances such as flight of a suspect, threatened removal or destruction of evidence or contraband or where the thing to be searched is a moveable vehicle which would permit dispensing with a search warrant but that none of those circumstances were present in the Johnson case and therefore held the search to violate the defendant's rights under the Fourth Amendment. *Trupiano* v. *United States*, 334 U.S. 699, 78 S.Ct. 1229, 92 L.Ed.

1663, was decided five months later in June of 1948. The court there upheld an arrest on probable cause but rejected the contention that the seizure of contraband was incidental to the valid arrest in the absence of a search warrant. Relying upon the language from pages 14-15 of the *Johnson* case discussing the exceptional circumstances permitting a search without a warrant the court concluded at pages 706-708 that the validity of the search depended on the practicability of obtaining a search warrant. Since it was there conceded that an abundance of time existed during which a warrant could have been obtained the Court held there was error in admitting into evidence the seized contraband and reversed.

In December of 1948, the same year *Johnson* and *Trupiano* were decided, the Supreme Court had another occasion to pass upon the validity of a search without a warrant in *MacDonald* v. *United States*, *supra*, [335 U.S. 451]. There police officers broke and entered a rooming house through the landlady's room, walked upstairs and placed themselves in a position by looking over a transom where they saw the misdemeanor of conducting a lottery committed. The officers then entered the room and arrested the occupants. At pages 454-455, the Court, speaking through

Mr. Justice Douglas[16], relying upon *Johnson* and *Trupiano*[17], held that there was no compelling reason offered justifying the absence of a search warrant where the defendant's activities had been under surveillance for months and reversed for error in admitting the evidence obtained by an illegal search and seizure.

The next case in the development of the law of search incident to arrest and its relation to the Fourth Amendment was *Rabinowitz* v. *United States, supra,* [339 U.S. 56]. The court in *Rabinowitz* rejected the reasoning of *Trupiano, supra,* at page 66 as follows:

> "To the extent that *Trupiano* v. *United States,* 334 U.S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. The relevant test is not whether it is reasonable to

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16 This opinion was concurred in by Justice Black. Justice Rutledge concurred in the result without stating his reasons and Justice Jackson wrote a concurring opinion. Justice Frankfurter joined in the majority opinion and concurred in Justice Jackson's. Three justices dissented. Justice Jackson, the author of the *Johnson* opinion, did not rely on *Trupiano,* but said at pages 458-459 that the felony of breaking into the landlady's room being far more serious than the offense the officers were suppressing followed every step of their journey and "tainted its fruits with illegality".

17 It appears that appellant is again in error when he states at page 28 of his brief:

"This decision *(MacDonald)* is based upon the rule announced in the *Johnson* case, *supra,* . . . and does not repose on the *Trupiano* ruling . . ."

procure a search warrant, but whether the search was reasonable."

The novel concept enunciated in the dictum of *Johnson* and made part of the law of searches and seizures by *Trupiano* and relied on in *MacDonald* was thus eliminated by *Rabinowitz* and the standard of *Harris* v. *United States*, *supra*, [331 U.S. 145] was reinforced, making a search incident to a lawful arrest turn on the question of reasonableness rather than upon the practicability of procuring a search warrant. To the extent that *Trupiano* depends on *Johnson* and *MacDonald* depends on *Johnson* and *Trupiano*, *Johnson* and *MacDonald* must fall insofar as they require a search warrant solely upon the basis of the practicability of procuring one rather than upon the reasonableness of a search incident to a lawful arrest.[18] The test of reasonableness of a search incident to a valid arrest "depends upon the facts and circumstances — the total atmosphere of the case", *Rabinowitz* v. *United States*, *supra*, [339 U.S. 56] at page 66 and "is in the first instance for the District Court to determine". *Rabinowitz* v. *United States*, *supra*, at page 63. The determination by that court upon a constitutional issue is not binding upon this court, but is en-

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[18] See Justice Frankfurter's dissenting opinion in *Rabinowitz* v. *United States*, *supra*, (339 U.S. 56) at pages 85-86.

titled to weight. *Blackford* v. *United States*, *supra*, [247 F. 2d 745], at page 751.

Appellant mistakes the impact of *Rabinowitz* upon this aspect of *Johnson* and *MacDonald* for he apparently contends at pages 10-11 of his brief that the officers here should have gone before a magistrate and sought a search[19] or arrest [20] warrant prior to their entry into his hotel room to effect his arrest.

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[19] Rule 41(c) of the Federal Rules of Criminal Procedure provides in pertinent part:

"If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the propery and *naming or describing the person or place to be searched* . . . The warrant shall direct that it be served in the daytime, but if the *affidavits are positive that the property is on the person or in the place to be searched*, the warrant may direct that it be served at anytime." (Emphasis supplied).

In view of these requirements it would appear doubtful that the officers here involved could have obtained a search warrant daytime or night time prior to 9:40 P.M. on March 25, 1958 when they were outside room 304, Frye Hotel, because they did not know where the narcotics were, unlike *United States* v. *Johnson, supra,* (333 U.S. 10). The narcotics could well have been located in a stairway, closet, elevator, other hotel room or even somewhere outside the hotel. Accordingly, there was no probable cause to search a place which could be particularly described. *Steel* v. *United States,* 1925, 267 U.S. 498, 503, 45 S.Ct. 414, 69 L.Ed. 757; *United States* v. *Innelli,* D.C. E.D. Pa., 1923, 286 Fed. 731, 732, 733; *United States* v. *Hinton,* 7 Cir., 1955, 219 F. 2d 324, 325, 326; *United States* v. *Brown,* D.C. E.D. Va., 1957, 151 F. Supp. 441.

[20] Rule 4(a) of the Federal Rules of Criminal Procedure provides in pertinent part:

"If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue . . ."

Prior to 9:40 P.M. on March 25, 1958, it would appear doubtful

In answer to such argument the following language from *Rabinowitz*, at page 65, is appropos:

> "A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged

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that the officers could have obtained a warrant of arrest for appellant for delivery of narcotics to Younger earlier in the day or for concealment of narcotics for the only information the officers then had was the as yet unverified word of the informer. Cf. *Draper* v. *United States, supra,* (27 L.W. 4085) at 4086; *Carter* v. *United States,* 5 Cir., 1956, 231 F. 2d 232, cert. den. 351 U.S. 948, 76 S.Ct. 1052, 100 L.Ed. 1948; *Wrightson* v. *United States,* D.C. Cir., 1955, 222 F. 2d 556; *United States* v. *Li Fat Tong,* 2 Cir., 1945, 152 F. 2d 650; *United States* v. *Castle,* D.C. D.C., 1955, 138 F. Supp. 436 at 439. *Untied States* v. *Heitner,* 2 Cir., 1945, 149 F. 2d 105, 106 appears to permit an arrest solely upon the basis of hearsay, but there the arrest was made after the defendant, upon seeing the officers, tried to get away. See also *Giordenello* v. *United States,* 1958, 357 U.S. 480, 485, 78 S.Ct. 1245, 2 L.Ed. 2d 1503.

Appellant's argument here appears to be that prior to 9:40 P.M. the officers had sufficient information to establish probable cause for purposes of obtaining an arrest warrant but at 10:00 P.M., after Younger came out of Hopper's room and delivered a "bindle" of heroin to agent Gooder they did not have probable cause to arrest.

in daily battle with criminals for whose restraint criminal laws are essential."

The search in the instant case was of appellant's person from which the government currency was recovered. The seizure of the contraband was made in appellant's hotel room after the officers struggled to obtain it from the appellant's person. It appears obvious that appellant was attempting to destroy or remove these narcotics. Under these circumstances it appears clear that the search incident to a valid arrest was reasonable and did not violate appellant's rights under the Fourth Amendment. *Rabinowitz* v. *United States, supra,* [339 U.S. 56]; *Harris* v. *United States, supra,* [331 U.S. 145]; *Agnello* v. *United States, supra,* [269 U.S. 20].

CONCLUSION

As Chief Justice Vinson said in *Harris, supra,* [331 U.S. 145] at page 155,

> ". . . we should not permit our knowledge that abuses sometimes occur [during the course of criminal investigations] to give sinister coloration to procedures which are basically reasonable."

For the reasons above set forth, appellee respectfully submits that the search which occurred during the investigation of this case was reasonable and incidental to a valid arrest; that the District Court did not err in denying appellant's motion for return of property and to suppress evidence and did not err by permitting appellee to introduce Exhibits 1, 2 and 4 into evidence during the trial. Accordingly, appellant's conviction should be affirmed.

Respectfully submitted,

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